# Towards a Native Feminist Consciousness:

# Legal, Tribal and Gender Sovereignty for Native Americans

Honors Research Thesis

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By:

Lyndsay Montour

The Ohio State University

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Project Advisor: Associate Professor Judy Tzu-Chun Wu, Department of Women's, Gender and Sexuality Studies and History

*Introduction*

As of 2007, there are an estimated 4.5 million American Indians and Alaskan Natives living in the United States, which is about 1.5 percent of the population (Bureau of Indian Affairs). About half of the Native American population lives off tribal lands and only about 1.9 million are enrolled in a federally registered tribe (Bureau of Indian Affairs). Within the United States, there are 512 recognized native groups and 365 state-recognized tribes who speak over 200 different languages (Hamby 2005, 175). The Native American population is an extremely diverse and heterogeneous set of communities (Hamby 2005, 175). One commonality among all of these communities is that sexual violence disproportionately affects Native American women.

Native American women are twice as likely to be victimized by violent crimes, including sexual violence, than any other ethnic group of women (Smith 2005, 28). The U.S. Department of Justice estimates that more than one out of three, 34.1 percent, Native American women will be raped in her lifetime, and three out of four will be physically assaulted (U.S. Senate 2007, 36). In cases of rape or sexual assault of Native women, about nine in ten were estimated to have non-Native perpetrators (U.S. Senate 2007, 36). The social realities facing Native communities, such as poverty, inadequate law enforcement, and limited tribal justice sovereignty, creates an environment where crime rates are high and prosecution rates are low. Native communities residing on tribal lands are faced with particularly significant legal, political and social inequalities. The gaps in federal law and insufficient resources to support tribal justice systems allow perpetrators to commit acts of violence with little or no accountability for their crimes (U.S. Senate 2007, 37). As a result, Native American women on tribal lands are particularly vulnerable to abuse, violence and injustice.

My paper examines the 2010 Tribal Law and Order Act, which sought to manage the disproportionate levels of crime on tribal lands, specifically sexual violence against Native American women. However, I argue that this law does not directly address the underlying issues of tribal sovereignty and intersectional oppressions leading to the intense sexual violence against Native American women. As Andrea Smith has argued, sexual violence is a tool of patriarchy and colonialism (2005, 8). The Tribal Law and Order Act, while attempting to create a more safe and secure environment for Native communities, ultimately represents a continuation of the colonial-ideology of past federal Indian policy. It does not deconstruct the U.S. federally imposed systems that restrict tribal sovereignty, justice and safety. It is operating under the same U.S. federal structures and systems that disenfranchise Native peoples. Tribal sovereignty must be reinstated to allow Native communities to directly address the violence against the people on their lands. The sexism, patriarchy and political instability imposed by colonialism have created a hostile society for Native American women. A Native feminist analysis is needed to foster a movement to reinstate tribal sovereignty, de-colonize the society and systems surrounding Native communities, and end the sexual violence against Native American women.

To make my argument about how the Tribal Law and Order Act continues past colonial practices and the need for an indigenous feminist perspective to truly address sexual violence against Native American women, my thesis will offer three forms of analysis. First, I apply feminist anti-violence theories and an intersectional discourse to analyze the systematic and social inequalities Native American women encounter. Second, I examine previous Indian Federal Policy, its colonial-ideology, and the challenges it has imposed on tribal sovereignty and wellbeing. Finally, I analyze the initiatives and details of the Tribal Law and Order Act, and how they fail to truly address the issues women are facing.

*Feminist Theory: The Need for Native Feminist Analysis*

All women have the right to freedom from the gendered crime of sexual violence, where sex is used as a weapon of dominance, control and physical assault. Rape is different from other forms of violence and assault because it is an attack on a body that asserts a sexualized imposition of power. Male and female sexual bodies are constructed within society as different and unequal, and in addition, directly relate to definitions of masculinity and femininity. The inequalities defined by gender create an environment where rape and sexual violence are tolerated as "normal" displays of social power. A movement to end sexual violence must be cooperative among men and women because the assertion of female equality must coincide with the deconstruction of "inherent" masculine dominance. Race and class identities further complicate the constructions of gender. Intersectionality, a concept developed by Kimberle Crenshaw, suggests that focusing on just one dimension of inequality, such as sexism or racism, is insufficient for explaining sexual violence; instead, an analysis of how multiple dimensions of oppression and power simultaneously define one another is necessary (1991, 1244). Sexual violence is an intersectional problem and ignoring aspects of peoples' identities and social circumstances results in an insufficient understanding of sexual violence, which leaves marginalized women more vulnerable to abuse. Feminist anti-rape literature, activism and policy development will fully articulate a politics of social change by incorporating an intersectional approach, which recognizes the voices and equality of Native American women.

Effective anti-rape and anti-sexual violence strategies incorporate two complimentary approaches: increasing the awareness and acknowledgment of sexual violence, and development of legal procedures and prevention plans. The consciousness raising approach encourages

women to speak about their experiences of rape to put a face on the realities of sexual assault. The rhetorical aim of this strategy is to make the general public aware that rape is a "pervasive, society-wide problem" (Henderson 2007, 227). The latter approach focuses on the expansion of the legal definitions and enforcement against sexual violence (Henderson 2007, 227). Legislative reform surrounding rape must be accompanied by redefinitions of masculinity, assertion of women's agency, and an egalitarian relationship between the sexes (Henderson 2007, 233). Previous anti-sexual violence discourses were unsuccessful because early activists de-individualized the problem, and focused solely on the social dimensions of gender violence (Richie 2005, 25). The components of race and class were commonly ignored to "ensure" a broad social response and universal support for the anti-gender violence movement (Richie 2005, 52). The national dialogue against gender violence, "it can happen to anyone," actually meant, "it can happen to those in power" (Richie 2005, 53). The discourse for the anti-gender violence movement was largely in response to the victimization of women within the dominant social spheres.

Violence has a history of being disregarded when the home and the people are 'othered' (Crenshaw 1991, 1260). For example, the Violence Against Women Act (VAWA) of 1991 was developed primarily in response to the battered women in white communities (Crenshaw 1991, 1260). Gender violence had long been present in minority communities before VAWA of 1991, but legislation surrounding this issue was not seen as a priority (Crenshaw 1991, 1260). Women of color are often forced to keep the sexual violence in their communities and home silent because of the perceived threat to racial solidarity and their marginalization within mainstream channels of victim support (Crenshaw 1991, 1251, 1273, 1282). Intersectionality recognizes the complex dimensions of people's identities and how these elements impact their experiences

within a society (Crenshaw 1991, 1242). It attempts to unpack the hierarchical construction of difference within society, while reintegrating an egalitarian value of difference. Anti-sexual violence movements in the past have focused on race and gender separately, not as inseparable components of an individual identity (Crenshaw 1991, 1244). Preventing sexual violence against Native American women requires an intersectional analysis because their victimization is collectively influenced by their status as women, further as women of color, and even further as women of color on politically marginalized lands.

Andrea Smith argues in *Conquest: Sexual Violence and American Indian Genocide* that gender violence is not simply a tool of patriarchal control, but also serves as a tool of racism (2005, 1). For Native American women in particular, the colonial legacies and relationships affecting their communities are gendered and sexualized (Smith 2005, 1). The political, social and economic structures in the U.S. relied heavily on unequal gender relations. Past federal assimilation policies, such as the Dawes Severalty Act of 1887, which is discussed more in-depth in the following section, and federally funded Christian boarding schools, imposed patriarchal values on Native communities. The goal of U.S. federal authority was to disrupt the reciprocal and egalitarian authority and relationship between Native men and women. Colonial sexual violence establishes the ideology that Native bodies are inherently violable and by extension, that Native land is also inherently violable (Smith 2005, 12). For example, precolonial Cherokee society allowed women to have a voice and authority (Perdue 2007, 280). While Cherokee lands were technically communal property and anyone could use unoccupied land, improved fields belonged to specific matrilineal and matrilocal households (Perdue 2007, 281). Cherokee women retained authority over the land, as long as they had authority in society. However, because the "civilization" programs of the U.S. federal Indian policy produced a transformation

of gender roles, women began to lose their voice in the government (Perdue 2007, 282). By disenfranchising Cherokee women, it was easier for non-Native peoples to seize, allot, and profit from the land. The disparities of jurisdiction between tribal governments and the federal government, essentially gave non-Native people freedom to exploit, abuse and control Native American communities.

Native American reservations have become 'breeding' grounds for all types of crime, including sexual violence. By living on politically marginalized land, Native American people suffer from policies and public perceptions of inferiority and inequality. Paradoxically, previous treaties, between tribal nations and the United States federal government, have a legal responsibility to ensure the protection of the rights and well-being of American Indian and Alaska Native peoples (Amnesty International 2007, 2). The safety of Native American women is directly related to the authority and capacity the U.S. government entrusts to tribal communities and justice systems (Amnesty International 2007, 1).

Native American women are forced to navigate through a legislative maze when seeking justice for the sexual violence committed against them. Restricting tribal law enforcement and justice systems to prosecute crimes committed on tribal lands minimizes the safety of Native communities and, consequently, fosters a "lawless" environment. The Major Crimes Act of 1885 prohibits tribal justice systems from prosecuting major crimes, such as murder and rape. Therefore, the U.S. federal government is responsible for prosecuting crimes of sexual violence (in states where Public Law 280 applies, further explained below, state governments are responsible). However, research by Amnesty International has concluded that FBI involvement in the investigation of crimes of sexual violence is rare. The cases that are pursued suffer from lengthy delays, and in some instances, federal authorities may not accept cases in which tribal

police have begun an investigation (Amnesty International 2007, 42). Essentially, the legislative barriers enacted by U.S. Congress have "codified" the rape of Native American women because it is nearly impossible to obtain adequate prosecution and punishment for these crimes. State and federal governments are neglecting their duties to protect Native American women, and are instead protecting the distinctly white male perpetrators. The legacies of white colonial power are deeply entrenched in federal Indian policies and contribute to the political, economic and social marginalization of Native peoples. In order for Native American communities to adequately address the needs of Indigenous women, contemporary patriarchal institutions and attitudes need to be acknowledged and rectified.

Gender equality and tribal sovereignty must be connected in order to combat sexual violence against Native American women. The male-dominated tribal councils, governments, and communities are reflective of the colonial legacy of patriarchy, racism and sexism, and therefore, these indigenous institutions also tend to ignore the issue of sexual violence. Previous Federal Indian policy has imposed patriarchal values and gender norms on Native communities, encouraging sexism, misogyny and its related potential for violence against women (Ramirez 2007, 29). For example, Grant's Peace Policy of 1869 formalized the boarding school system and transferred the administration of Native lands to Christian churches and missionary societies (Smith 2005, 35). The boarding schools strictly taught Native girls skills such as ironing, sewing, washing and serving, in order to transform them into middle class housewives (Smith 2005, 37). Essentially a "cult of domesticity" was imposed on Native women, in which the ideal woman confined herself to home and hearth, while men contended with the misogynistic world of government and business (Purdue 2007, 285). This imbalance of power between men and women, can lead to sexually abusive relationships. The United States Department of Justice

estimates that Native American women suffer death from domestic violence rates twice as high as any other ethnic group of women in the U.S. (Smith 2005, 138). The high rates of domestic violence in Native communities reflect the male-dominated, female-subordinate household established by U.S. influence. Unless political and social institutions are redefined in egalitarian ways, Native communities will be unable to fully assert their sovereignty and legitimacy in their justice systems (Smith 2005, 139). Egalitarian autonomy and independence in tribal nations requires redefinition of sovereignty using Native feminist analysis.

A Native feminist analysis is an intersectional approach to gender equality, which emphasizes the unique, oppressive situations of Native American women, as well as other marginalized women. Native women's interpretation of tribal sovereignty ensures recognition of the structures that establish gender-specific vulnerabilities (Ramirez 2007, 29). As Native women develop their unique, individual feminist consciousness, it will produce a larger collective action to end the violence against women and further provide the necessary ontological shift from past anti-violence movements and strategies. The diversity among Native tribes and nations will result in various developments of feminist consciousness among individual men and women. Although each community will address their distinctive obstacles and incorporate culturally unique strategies, the larger feminist ideology provides a universal goal of equal worth, protection and agency among men and women. New policies and programs developed through the perspective of Native women, will decolonize tribal nations by reincorporating egalitarian gender systems, and analyze how both Native men and women experience sexual, racial and other oppressions (Ramirez 2007, 34). Federal Indian policy, up until the Tribal Law and Order Act of 2010, has been defined, legalized and enforced by U.S. white male authority.

*History of Federal Indian Policy*

Legal barriers and inadequate enforcement leave Native women at risk of violence in their communities everyday. According to the Major Crimes Act of 1885 and Public Law 280 of 1953, which will be discussed in detail in the following section, the federal government is charged with responding to the victims and prosecuting the sexual violence perpetrators. However, as Smith argues, these responsibilities are often neglected,

> It is undeniable that U.S. policy has codified the "rapability" of Native women. Indeed, the U.S. and other colonizing countries are engaged in a "permanent social war" against the bodies of women of color and indigenous women, which threaten their legitimacy. Colonizers evidently recognize the wisdom of the Cheyenne saying, "A nation is not conquered until the hearts of the women are on the ground." (Smith 2005, 33)

Sexual victimization itself is a part of the history of oppression, violence and maltreatment that Native Americans have experienced at the hands of the U.S. government and its citizens (Hamby 2008, 90). Native American women living on tribal lands suffer additional legal barriers and obstacles to justice because of the complicated relationships among tribal, state and federal laws. In order to understand the "codification" of sexual violence against Native American women, the history of United States federal Indian policy must be explained.

The language and development of current legislation relating to Native communities, such as the Tribal Law and Order Act, has culminated from a long history of United States federal Indian policy. The legacy of disrespect, exploitation, and abuse of Native American peoples has been a consistent part of U.S. legislation. Native American community members have been removed from their lands, forced to attend "American" schools away from their families, and patronized as incapable savages.

After the Revolutionary War ended in the late eighteenth century, the official position of the U.S. government was to regard Native American tribes as having equal status with foreign nations (Pevar 2002, 6). Congress made every attempt to keep favorable relations with Native tribes, passed laws prohibiting non-Native people settling on tribal lands, and refrained from passing any laws that limited the ability of Indians to govern themselves (Pevar 2002, 6). Although Native American sovereignty was "officially" respected in Congressional proceedings, little was done to enforce the laws protecting tribal lands and independence (Pevar 2002, 6).

The economic growth and expansion of cotton and other cash crops in the antebellum South instigated the need for more "free" land and resources. In 1830, Congress passed the Indian Removal Act, which authorized the President to negotiate the removal of eastern tribes, and relocate them west of the Mississippi River (Pevar 2002, 7). This was one of the first policies of Native American colonization by the United States government. A reservation policy, requiring Native Americans to reside on specific areas of land, was implemented in the 1850s, because of the new land acquisitions in the West, the discovery of gold, and the construction of railroads that linked the eastern and western coasts (Wilkins 2002, 108).

In 1871, Congress passed a law that prohibited future treaties between the United States and Indian Nations (Pevar 2002, 8). This law had both a symbolic and practical effect: "symbolically, its passage meant that Congress no longer considered tribes as independent nations capable of signing a treaty; as a practical matter, it meant that Congress could limit tribal powers and take Indian land anytime it wanted to, simply by passing a law to that effect" (Pevar 2002, 8). Consequently, policies toward Native American peoples situated them at the bottom of the U.S. socioeconomic ladder (Smith 2005, 37).

The Indian Country Crimes Act of 1875 extended the body of Federal criminal law that applied to Federal enclaves, to Indian Country (U.S. Senate 2007, 45). Under these principles the Federal government has jurisdiction in Native American lands over crimes committed by Native peoples against non-Native people, and vice-versa (U.S. Senate 2007, 45). In addition the Major Crimes Act passed in 1885, granted the Federal authorities jurisdiction over certain serious crimes committed by Indian perpetrators in Indian Country, including rape and murder (U.S. Senate 2007, 11). Although the act did not explicitly prohibit tribal authorities from retaining concurrent jurisdiction over Native American perpetrators, the reality was that few major crimes were pursued through the tribal justice system (U.S. Senate 2007, 11). Federal Indian policy continued to appropriate land for white settlement and assimilate Native Americans into "civilized" white culture (Pevar 2002, 8).

The continental expansion of the late 1880s sparked a Congressional interest in regulating Native people and the lands they occupied. Under the ideology "kill the Indian and save the man," acculturation through education became a new emphasis of U.S. government (Smith 2005, 36). By 1887, more than two hundred schools had been established under federal supervision, with the sole intention of "educating" and "civilizing" Native youth (Pevar 2002, 7). The boarding schools had particularly negative intentions for Native American women and girls. The primary role of the education was "to inculcate patriarchal norms into Native communities so that women would lose their place of leadership in Native communities" (Smith 2005, 37). Sexual, physical and emotional abuses were rampant and the schools refused to investigate, even when teachers were publicly accused by their own students (Smith 2005, 38). Patriarchal household structure was reinforced by land allotment policies that only acknowledged Native American males as acceptable property holders.

In 1887, U.S. Congress passed the Dawes Severalty Act. The Dawes Act was designed to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large (Pevar 2002, 8). The goals of the Act were accomplished through division of communally held tribal lands into separate parcels, or allotments (Pevar 2002, 8). Each male tribal member was assigned an allotment and the remaining land was sold to non-Indian farmers and ranchers (Pevar 2002, 8). As Native Americans became neighbors with non-Native peoples, they were "supposed" to emulate white, civilized culture and reduce the poverty among the Native population. However, the Dawes Act intensified the poverty among Native Americans because they did not have the capital to buy the equipment, cattle, or seeds to initiate small-scale farming (Pevar 2002, 9). Many Native allotment owners ended up selling their land to white settlers or losing it in foreclosure when they could not pay the real estate taxes (Pevar 2002, 9). By eliminating a majority of community land and introducing private ownership, Congress was attempting to forcefully integrate Native Americans into white, heteropatriarchal society. Although in the 1930's, federal Indian policy attempted to take a more humane approach, poverty and disruption of egalitarian gender norms had already devastated many Native communities.

The economic instability of the Great Depression encouraged the development of a new national character that emphasized American plurality (Morgan 2005, 57). John Collier was the commissioner of the Bureau of Indian Affairs from 1933-1945, and his goal was to end previous assimilation policies and promote greater tribal political autonomy (Morgan 2005, 58). In 1934, the Indian Reorganization Act (IRA) was passed with the purpose "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism" (Pevar 2002, 10). Its main components were to end allotment and

promote self-government among tribal communities by allowing tribes to elect their own governing councils, write constitutions and establish corporate charters (Morgan 2005, 58). In addition to the legislative changes of the IRA, the Collier administration pushed for economic relief and development (Morgan 2005, 58). However, like almost all federal Indian policy, Native American nations were not consulted in the development of IRA language and legislation. Many of the proposed changes were never realized in Native communities and the IRA was largely perceived as another bureaucratic imposition that failed to transfer real power to the tribes (Morgan 2005, 59).

As support for the "benevolent" attitude of the IRA began to fade, federal recommendations reverted back to full assimilation into white society (Pevar 2002, 11). This assimilation was seen to be in the U.S. government's best interests because of the money saved by ending federal Indian programs (Pevar 2002, 11). House Concurrent Resolution No. 108 was adopted by Congress in 1953 and resulted in termination of all federal programs benefiting over 109 tribes (Pevar 2002, 11). The termination policy was an acculturation strategy of the Federal government to remove the "savage" out of Native Americans. This program was implemented during the widespread Communist scare, and the constant fear that American values were under attack from forces inside and outside the country (Langston 2003, 116). Native peoples who had not assimilated into dominant American culture, especially those still living on the reservation, were considered a national concern (Langston 2003, 116). There was a sense in Congress that the IRA period's policies were hindering Native American's progress as American citizens and the solution was to abandon tribal reorganization goals, while terminating federal benefits and support services for tribes (Wilkins 2002, 114). The strategy was to remove Native Americans from their tribal lands, and move them into the city (Langston 2003, 116).

The urbanization was facilitated by offering Native communities, usually younger tribal members with more employable skills, one-way bus fare and the promise of assistance in finding jobs and housing in urban areas (Langston 2003, 116). The termination policies resulted in the number of Native Americans living in cities increasing from 13 percent in 1940, to more than 50 percent by 1980 (Langston 2003, 116). The Bureau of Indian Affairs estimates that 200,000 Native Americans were relocated under the Termination Act, in comparison to 89,000 relocated from the Indian Removal Act of 1830 (Langston 2003, 116). By disrupting the special solidarity of Native communities, the Federal government weakened the resistance to acculturation and enabled more control over the tribal lands, resources and people. Public Law 83-280 (PL 280), which transfers federal criminal jurisdiction from the Indian Country Crimes Act to the applicable states' governments, furthered the termination of the trust between federal powers and Native American nations (U.S. Senate 2007, 11).

Prior to PL 280, many Native communities were having trouble with non-Native peoples trespassing onto Native land, cutting the timber, and rerouting the water (Goldberg-Ambrose and Seward 1997, 7). U.S. federal government rarely took action to prosecute these offenses because of the movement to end federal Indian programs (Goldberg-Ambrose and Seward 1997, 7). Therefore, PL 280 was implemented in 1953, devoid of Native American participation or consent, to increase state civil and criminal jurisdiction. It was first implemented in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin, and later in Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington (U.S. Senate 2007, 11). PL 280 remains an active law today and is still seen as an affront to tribal sovereignty.

The negative reaction of Native communities to PL 280 stemmed entirely from its initial unilateral imposition of state law and the omission of tribal consent (Goldberg-Ambrose and

Seward 1997, 51). Native communities had no influence or voice when it came to the adoption of PL 280. However, the state governments have the option to assume and relinquish jurisdiction over Native communities (U.S. Senate 2007, 11). A consent provision was added as an amendment in 1968, but it was not retroactive, which meant that tribes in states where PL 280 already applied were not allowed to refuse control (Goldberg-Ambrose and Seward 1997, 56).

In addition, states and tribal authorities did not receive enough funds to assume their respective responsibilities (U.S. Senate 2007, 11). The amendments to PL 280 did not resolve the financing problems that state budgets were struggling with due to an extended area of patrol (Goldberg-Ambrose and Seward 1997, 56). Amnesty International estimates that Native communities only have 55-75 percent of the resources and law enforcement of the resources and law enforcement in non-Native rural communities (U.S. Senate 2007, 7). Consequently, Native American lands have become a target for all crimes because of inadequate policing systems, remote areas, substantial poverty and lack of prosecution (U.S. Senate 2007, 2). The imposition of PL 280 without consent of Native communities reinforces that federal Indian policy has been created with the ideology that Native bodies and lands are inherently violable (Smith 2005, 12).

Through the Indian Country Crimes Act of 1875 and the Major Crimes Act of 1885, the Federal government mandated its responsibility to ensure law enforcement, justice and public safety in Native communities. Native American tribes have gradually been stripped of their sovereignty and self-determination in policing and justice systems. The federal government failed to provide adequate funding to ensure public safety, and PL 280's transition of power to state governments continued the neglect of Native communities' well-being. State governments have not received additional funds from the federal government and there is little incentive to send adequate law enforcement to tribal lands. U.S. federal Indian policy up until the disruptive

legislation of the 1950's solidified the social status of Native Americans as savage, foreign, and dependent communities, whom are incapable of economic, political and social sovereignty.

The damaging legislation of the 1950's, such as PL-280 and the Termination Act of 1953, fueled a crucial period of political change for Native Americans. The 1960s was an era when tribal nations, and Native Americans in general, won a series of important political, legal, and cultural victories in their epic struggle to end the termination policies, and regain a measure of real self-determination (Wilkins 2002, 115). Native American activists drew on their unique history of resistance and conflict over land, resources, and bodies (Langston 2003, 115). They were focused less on integration with dominant society, and more on maintaining cultural integrity, because of the history of forced assimilation (Langston 2003, 115). Because Native American communities are owners of lands and resources, they were concerned with the enforcement of treaty rights, not necessarily civil rights, and the solidarity among Native activists emphasized empowerment of the tribe, over the individual (Langston 2003, 115). The federal government responded to this activism by enacting the Indian Civil Rights Act (ICRA) in 1968.

The ICRA was the first piece of legislation to impose many of the provisions of the U.S. Bill of Rights on the actions of tribal government with respect to the reservation residents (Wilkins 2002, 115). Prior to this act, Native communities had not been subject to constitutional restraints in their governmental actions (Wilkins 2002, 116). Before the ICRA was enacted, Native American supporters and lobbyists believed it would bring recognition the distinctive group and individual rights of Native people (Wilkins 2002, 115). However, the ICRA was a major intrusion of U.S. constitutional law, reinforcing the idea that the tribal justice system is incapable of handling criminal cases. The act limited the sentence that can be imposed by tribal

courts for any offense, including murder and rape, to a maximum of one-year imprisonment and $5000 fine (U.S. Senate 2007, 11). The message sent by this legislation is that tribal courts can only handle less serious crimes (U.S. Senate 2007, 11). However, tribal justice systems have managed more serious crimes, such as rape and murder, in the past. The courts are not able to develop and adjust to current criminal justice needs because they are prevented from handling difficult cases. The public safety crisis in Native communities has stemmed partly from limitations and restrictions on tribal justice systems. Federal courts have not provided Native Americans with proper justice and retribution for crimes committed on their lands. Tribal courts need to be entrusted with authority and an adequate punishment system, if the safety of Native Americans will ever be fully secure.

Native American activism continued with the activities and events of the American Indian Movement (AIM). AIM was founded in 1968 by a group of young, urban Native Americans in Minneapolis, initially responding to the police harassment and targeting by the FBI (Langston 2003, 117). AIM concentrated on reeducating Native Americans in historical practices and cultural values, while leading effective symbolic actions that challenged and educated society (Langston 2003, 117). The occupation of Alcatraz Island in 1969 was a landmark event that galvanized Native pride and consciousness, helped shape public opinion and influenced public policy (Langston 2002, 118, 121). Following Alcatraz, President Nixon declared that tribal sovereignty was a goal of his administration (Wilkins 2002, 116). Congress responded by passing legislation, such as the Indian Education Act of 1972, Indian Self-Determination and Education Assistance Act of 1975, and the Indian Child Welfare Act of 1978, designed to improve tribal nations and Native people in every sphere (Wilkins 2002, 116).

However, these political victories created a backlash headed by non-Native peoples, which culminated in the Supreme Court's decision in *Oliphant vs. Suquamish* in 1978.

In 1977, Mark Oliphant, a non-Native American resident of the Suquamish Tribe's Port Madison Reservation, was arrested by tribal authorities for assaulting a police officer on the reservation and resisting arrest (Maxfield 1993, 391). The Suquamish Tribe believed that it possessed jurisdiction over Oliphant's case because Congress had not restricted the Tribe's authority to enforce its own laws on its reservation (Maxfield 2003, 391). After two appeals, the U.S. Supreme Court reversed both lower courts' decisions to uphold the Suquamish Tribe's jurisdiction, and held that tribal courts lack criminal jurisdiction over non-Indians (Maxfield 2003, 398). The U.S. Supreme Court found that:

> Criminal jurisdiction over non-Indians, like the power to convey lands and the power to exercise external political sovereignty, was 'in conflict with the interest of overriding sovereignty' of the United States. Since these powers were 'inconsistent with a tribe's status as dependent nations,' they were extinguished when the United States was founded. The Court reasoned that allowing tribes to exercise criminal jurisdiction over non-Indians would be inconsistent with the founders' great concern for citizens' personal liberties. (Maxfield 2003, 398).

The outcome of *Oliphant vs. Suquamish* effectively strips tribal authorities of the power to prosecute crimes committed by non-Native American perpetrators on tribal land (U.S. Senate 2007, 11). Consequently, because the perpetrators of sexual violence are 90 percent non-Native, this leaves Native American communities unable to prosecute violent criminals (U.S. Senate 2007, 36). The penalty caps imposed by the ICRA effectively prevent tribes from prosecuting crimes of violence or other felonies committed by anyone, Native American or non-Native American (U.S. Senate 2007, 49). Native communities are dependent on the willingness and capability of Federal or state authorities to prosecute perpetrators (U.S. Senate 2007, 49).

Ultimately, the victims of sexual violence, and other violent crimes, pay the highest price because their abuse goes unpunished and their vulnerability to future violence remains imminent.

In the 2000s, the federal government began to depart from previous legislation and legal precedents. The case of the *U.S. vs. Lara* in 2001 was a landmark decision because the U.S. Supreme Court recognized the Spirit Lake Nation as a sovereign nation with criminal jurisdiction and authority. In 2001, Billy Jo Lara, a Native American, was arrested by the Bureau of Indian Affairs (BIA) officers on the Spirit Lake Indian Reservation for public intoxication and assault of a BIA officer in the course of his arrest (Brooks 2003, 2). Lara was not a member of the Spirit Lake Nation, and pled guilty to three violations of the Spirit Lake Tribal Code (Brooks 2003, 3). Lara was later charged in federal court with assaulting a federal officer, and the case was almost dismissed as violation of the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution (Brooks 2003, 3). However, the U.S. Supreme Court held that Lara violated laws in two independent sovereign nations, so his prosecution in federal courts would not violate the Double Jeopardy Clause (Brooks 2003, 3). The ruling in *U.S. vs. Lara* also reaffirmed the fundamental tenets of federal Indian law (U.S. Senate 2007, 41). The first fundamental tenet is that Congress has broad powers to legislate with respect to Indian affairs, which is grounded in the Indian Commerce Clause (U.S. Senate 2007, 54). The second tenet asserts that Congress has historically exercised its powers both to restrict and to relax restrictions on Native tribes' sovereign authority. This means that the powers of Congress may be used to both expand and contract tribal authority, and there are no textual limitations on restoring sovereign powers to the tribes (U.S. Senate 2007, 54). The interpretation of Congressional powers is important to analyze because, just as Congress influenced federal authority over Native nations in the past, it

retains that control of power with regards to future resolutions surrounding tribal sovereignty and judicial independence.

The complexities surrounding the procedures, jurisdiction and prosecution of sexual violence stem from Congress's decisions regarding federal Indian policy. The precedent set by *U.S. vs. Lara* is that Native justice systems are competent organizations capable of exerting jurisdictional authority and criminal prosecution. The U.S. federal government is not only largely responsible for the sexual violence crisis Native American women are facing, the solution relies on the powers and authority it retains. The Tribal Law and Order Act is an assertion of Congressional rule in response to the disproportionate levels of violence in Native communities. Although this law has good intentions of providing Native Americans with public safety and health, it is not the ontological shift, a Native feminist decolonization of tribal nations, needed to protect Native women against sexual violence.

*The Tribal Law and Order Act*

As the Chairman of the Senate Committee on Indian Affairs (SCIA) since 2007, former Senator Byron L. Dorgan sponsored the Tribal Law and Order Act (TLOA). He served as a Congressman and Senator for North Dakota for a total of thirty years until his retirement in January of 2011 (Capriccioso 2011). Dorgan was considered an ally to Native communities because he was willing to probe the Bureau of Indian Affairs and Indian Health Services regarding failures the Native leaders had been complaining about for decades (Capriccioso 2011). In the SCIA, he fought for improvement of health care, law enforcement, suicide prevention, and diabetes services (Capriccioso 2011). His relationship with Native American

communities, both in North Dakota and across the country, resulted from his service as Chairman of the SCIA. The passage of the TLOA was a major stride for the SCIA in 2010.

The TLOA became Public Law 111-211 on July 29, 2010. Dorgan's statement at the hearing, *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women*, recognizes the disadvantages Native American women face because of the Major Crimes Act, PL 280, the Indian Civil Rights Act and other federal Indian policies:

> The confusion that exists today is the result of outdated Federal laws and court decisions that were passed during a time when paternalism was this Nation's Indian policy. These laws directly conflict with the policy of Indian self-determination and they strike at the very heart of tribal sovereignty. As a result, victims in Indian Country rely solely on the Federal Government, specifically the FBI and the Unites States Attorneys Offices, to investigate and prosecute sexual violence in Indian Country. It is clear to me that the Federal Government is not meeting its obligation. (U.S. Senate 2007, 1-2).

The TLOA passed with bipartisan support, without amendment, in the House and Senate (U.S. Senate Committee on Indian Affairs 2010). The support from the House and Senate was unanimous because of the comprehensive research and information that resulted from the fifteen hearings on the various aspects of violence in Native communities (American Bar Association 2010). The credibility of the supporters, and the education and awareness raised in the hearings enabled the Senate and House to pass the TLOA into law without hesitation.

The numerous supporters of the TLOA included the American Bar Association, National Congress of American Indians, National Task Force to End Domestic Violence Against Women, National Native American Bar Association, and many different denominations of Christian Churches (American Bar Association 2010). The National Congress of American Indians (NCIA) was founded in 1944 and is the oldest, largest, and most representative intertribal interest group (Wilkins 2002, 206). The NCIA remains the dominant voice of Native communities in the U.S. because of its representativeness (Wilkins 2002, 207). However, the NCIA has been

accused of not being in touch with grassroots needs of Native Americans because it is no longer interested solely in domestic Indigenous issues (Wilkins 2002, 207). The NCIA has been working with the equivalent organization in Canada, the Assembly of First Nations, to promote solidarity and uninterrupted travel between U.S. and Canadian Native communities (Wilkins 2002, 207). The National Native American Bar Association (NNABA) aims to represent Native nations as well as Native American lawyers ("Welcome to the Native American Bar Association" 2011). NNABA initiatives include working to include Indian law on state bar exams, incorporate federal Indian law in law school curriculums in the form of "Indian Law Modules," and increase Natives and tribal court judges in the judiciary ("Projects" 2011). Native American women were important advocates for the passage of the TLOA because of its direct initiatives towards sexual violence. However, the prominent contributors and supporting organizations of the TLOA, which included women, work within the framework of U.S. politics and, consequently, did not apply a Native feminist analysis in the creation of the legislation.

The TLOA is responding to the intense levels of crime, substance abuse, and gender violence in Native communities. It specifically emphasizes decreasing all criminal acts and violence against women in Native communities. The new ideology behind the legislation is prosecution and prevention (The White House Administration 2010). The TLOA has several major provisions that attempt to address many difficulties Native American communities encounter in the prosecution of violent criminals and maintenance of public safety. However, the legislation still operates under the structures of sexism as well as racism and colonial oppression that originally codified the rapability of Native women.

The TLOA provides tribal police officers greater access to criminal history databases, such as the National Crime Information Center (U.S. Senate Committee on Indian Affairs 2010).

Although these systems of criminal justice are controlled and regulated by U.S. government entities, these requirements promote collaboration between tribal law enforcement, and U.S. federal and state law enforcement. A comprehensive crime database and evidence sharing will aid in the prosecution of sexual violence perpetrators. The TLOA also requires the U.S. Department of Justice to maintain data on criminal declinations and share evidence with tribal justice officials when U.S. attorneys decline a case (U.S. Senate Committee on Indian Affairs 2010). This provision, however, does not provide U.S. attorneys with incentives to prosecute cases of sexual violence against Native American women that they are ultimately responsible for under the Major Crimes Act of 1885. It is only after the case has been turned down in the federal and state jurisdictions that tribal justice systems are allowed to move forward with the case. Consequently, with this delay after the occurrence of the crime, it is likely that the case and the survivor will become lost in the legal "maze."

The TLOA requires tribal and federal officers serving Native American communities to receive specialized training to interview victims of sexual assault and collect crime scene evidence (U.S. Senate Committee on Indian Affairs 2010). It also requires IHS facilities to implement consistent sexual assault protocols, and requires federal officials to provide documents and testimony gained in the course of their federal duties to aid in prosecutions (U.S. Senate Committee on Indian Affairs 2010). However, the TLOA does not include any provisions of mandatory spending and there are no new spending authorizations (American Bar Association 2010). The legislation only reauthorizes existing programs at existing or last appropriated levels, which have been unable to provide adequate funding and resources, at the state and federal levels, in the past (American Bar Association 2010). Without additional means to employ nurses trained in sexual assault protocols and provide the sexual assault examination

kits needed to process evidence, the health related difficulties women face directly after the assault will not be resolved.

The TLOA aims to reduce the complexities of jurisdiction in Native American communities by enhancing the Special Law Enforcement Commission program, which deputizes tribal police officers to enforce federal laws on Native lands against all offenders (U.S. Senate Committee on Indian Affairs 2010). Although tribal police officers will be deputized to enforce federal laws against all violators, the precedence of *Oliphant vs. Suquamish* remains intact. Section 6 of the TLOA clearly states that, "Nothing in this Act confers on an Indian tribe criminal jurisdiction over non-Indians" (U.S. House 2010, 7). The prosecution of non-native perpetrators remains under U.S. federal or state jurisdiction. The inability of tribal courts to prosecute cases of sexual violence with non-Native perpetrators reinforces the system of Native female rapability.

In states where P.L. 280 applies, the state government retains jurisdictional authority. However, Section 201 of the TLOA allows a tribe to request concurrent jurisdiction with the federal government, when the state does not have adequate resources, from the Attorney General (U.S. House 2010, 27). The legislation never allows tribal court systems and governments to request authority and jurisdiction when the state or federal government is providing insufficient prosecution and public safety. Without tribal judicial sovereignty, Native communities lose the autonomy and determination over the crime and violence in their land.

The TLOA reauthorizes and improves programs designed to foster tribal court systems, tribal police departments, and tribal corrections programs (U.S. Senate Committee on Indian Affairs 2010). Section 304 of the TLOA requires that Native defendants sentenced to more than one-year imprisonment must be provided "effective assistance of counsel at least equal to that

guaranteed by the United States Constitution" (U.S. House 2010, 50). This section also requires all licensing of attorneys and judges to be equivalent of those in the U.S. system (U.S. House 2010, 50). This requires tribal justice methods, practices and beliefs to reflect the legal institution of the U.S and follow all judicial processes and procedures. The U.S. government regulates the standard of ethical and legitimate judicial procedures, and continues to limit the powers of tribal court punishments. Although the TLOA nullifies the previous punishment limitation in the ICRA of 1968, it only increases sentencing authority in tribal courts to up to three years (U.S. Senate Committee on Indian Affairs 2010). A maximum three-year conviction for all crimes, including murder and rape, does little to strengthen the power of tribal justice systems, and reinforces the "inferiority" of Native American society.

Since the enactment of the TLOA in 2010, there have been some swift implementations of the new procedures and requirements. The Bureau of Indian Affairs generated a training program for new and experienced Native courts, judges, clerks and administrators that began in March of 2011 (U.S. Department of the Interior 2011, 1). The training is designed to educate participants on the legal principles of the ICRA and the TLOA (U.S. Department of the Interior 2011, 1). However, there has been no progress on sexual assault training for medical officials and law enforcement. IHS facilities have not implemented new, consistent and more effective sexual assault protocols. Although the TLOA was only signed into law less than a year ago, the issues of sexual violence Native American women are experiencing require immediate intervention.

Native American supporters and lobbyists of the TLOA were not striving for egalitarian tribal sovereignty; they were working to hold the U.S. government accountable to the treaties and protections they claim to be responsible for from Indian policies. The act is an improvement to

existing systems and procedures, but continues to maintain the colonial dominance of the U.S. federal and state governments over Native society. The TLOA attempts to resolve the complex relationship between tribal and federal jurisdiction that is detrimental to survivors of sexual violence, but is unsuccessful because it does not fully address the intersecting oppression facing Native American women upheld by U.S. systems and society. In order for the tribal justice system to gain adequate autonomy, it must break the connection to U.S. government and rebuild itself by applying a Native feminist analysis and incorporating egalitarian values.

*Toward a Collective Native Feminist Consciousness and Egalitarian Tribal Sovereignty*

Early tribal laws surrounding rape and sexual violence practiced a victim-centered approach to justice (Hamby 2008, 99). In 1824, the original codification of the Muscogee Creek Nation rape law read:

> And be it farther enacted if any person or persons should undertake to force a woman and did it by force, it shall be left to woman what punishment she should satisfied with to whip or pay what she say it be law. (Hamby 2008, 99)

It is clear this law not only regards rape as a serious violent act, but the woman, the victim, is central to the protections and justice of the legislation. The language and essence of this law sexual violence has been lost in the depths of a patriarchal, colonialist, racist society. The continued disenfranchisement of Native American governments contributes to the struggles of Native women with sexual violence.

The decolonization of Native American nations, founded by men and women utilizing a Native feminist consciousness, is necessary to end sexual violence against Indigenous women. Deconstructing the racist, heteropatriarchal systems imposed on Native communities by the United States, requires a movement defined by intersectional egalitarianism. As I argued earlier,

engaging Native women's interpretation of tribal sovereignty ensures recognition of the structures that establish gender-specific vulnerabilities and allow them to be broken down. An ontological shift in the decolonization and tribal sovereignty efforts is necessary because patriarchal structures have permeated into Native communities, which continue to oppress women in addition to U.S. federal and state systems of dominance. Both men and women can participate in a Native feminist movement because it promotes an egalitarian paradigm that deconstructs all structures of abuse and inequality. As Native feminists begin to assert their voice in the bureaucratic negotiations between tribal, state and federal governments, this disruption begins the path for justice. Race, gender and tribal sovereignty are intersecting aspects of sexual violence against Native American women, which requires Native feminist analysis and a strong collective feminist consciousness to redefine the relationships between Native peoples, tribal authority, and U.S. government.

As Native Americans work to regain sovereignty and autonomy, women must be recognized as equal and important members of this struggle. A Native feminist movement ensures that women are not fighting for a Native nationalism that is ignoring their own needs and concerns that must also be liberated from misogyny and sexism (Ramirez 2007, 25). Together, Native men and women can work to demand the U.S. government entrust Native American communities with full judicial authority over the crimes committed on tribal lands. This requires that the precedence of *Oliphant vs. Suquamish* be overturned so non-Native perpetrators are allowed to be prosecuted in tribal courts. It is essential that the codified inferiority of tribal justice systems, through the Major Crimes Act of 1885 and the continued punishment limitations of the Tribal Law and Order Act of 2010, be amended and the competency of Native governments be acknowledged. Reincorporating a victim-centered ideology, possibly

reminiscent of the 1824 Muscogee Creek Nation rape law, will help to address the abuse sexual violence survivors experience in the criminal justice system.

Native American women have been abused, silenced and ignored throughout the historical relationship between Native nations and the United States. The high level of sexual violence is a product of the colonialist, racist and sexist systems of oppression that exists within Native communities and in the surrounding U.S. society. Tribal sovereignty redefined through egalitarian values and feminist analysis will ultimately end sexual violence and allow Native women to regain their autonomy, self-determination and voice. It is not about being just female but developing an individual Native feminist consciousness that recognizes of the plight of women and how it affects everyone. If Native American women were treated in a manner legally that countered the violence and suffering, this would make the lived experiences of all Native people better.

By writing this paper, I have actively engaged in the current, complicated dialogue surrounding the crisis of sexual violence against Native American women. In continuing my work, I would ideally narrow my research to one Native community, the specific instances of sexual abuse, and those women's experiences of the criminal justice system, both tribal and federal. I would be interested in investigating a historically matrilineal and matrilocal Native nation, such as the Mohawk or Cherokee tribes, to examine their understanding of my argument for Native feminist analysis and egalitarian ideals of individual feminist perspectives. I would also further investigate community-oriented justice systems, because they may reduce the tension between the survival of culture and community, and the safety and equality of Native American women. Ultimately, my goal is to further the work towards ending sexual violence against Native American women.

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